

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA

BANK OF OKLAHOMA, N.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-06-516-JHP
	)	
	)	
JAMES B. SMITH, et al.,	)	
	)	
Defendants.	)	

**ORDER**

Before the Court is Plaintiff Bank of Oklahoma, N.A. (“BOK”) and Defendant United States of America’s Joint Motion for Partial Summary Adjudication [Docket No. 41]. No response to the Joint Motion was filed, therefore, pursuant to LCvR 7.1(h) the Court deems it confessed and the Joint Motion is GRANTED.<sup>1</sup>

Based on the Joint Motion and the evidence offered in support thereof, the Court finds the following:

A. With respect to BOK:

- 1.) BOK has a valid, priority mortgage on real property owned by Defendants James B. Smith and Elizabeth Sue Smith located in Pittsburg County, Oklahoma (“Real

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<sup>1</sup> Because the parties have not raised the issue, the Court does not address the issue of BOK’s lien priority amount and it will remain for further determination, if necessary, after the sale of the Real Property.

Property”).<sup>2</sup>

2.) The BOK Mortgage secures the obligations of Defendants James B. Smith, Brett B. Smith, and Watt’s Oil Company pursuant to a BOK Note, a BOK Mortgage, and a BOK Guaranty.

3.) Defendants James B. Smith, Brett B. Smith, and Watt’s Oil Company have defaulted under the BOK Note and BOK Guaranty secured by the BOK Mortgage because of, among other things, failing to make monthly payments when due under the BOK Note and Mortgage.

4.) There is now due to BOK from Defendants James B. Smith, Brett B. Smith, and Watt’s Oil Company, Inc., the sum of \$527,094.90,<sup>3</sup> plus interest from February 20, 2008 at the rate of 18% per annum, which is \$192.90 per diem. Other expenses yet to be determined are accruing on the BOK Note and BOK Mortgage. In addition, BOK has incurred and continues to incur attorney fees and legal expenses in connection with this

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<sup>2</sup> The address of the Real Property is 1200 S. George Nigh Expressway, McAlester, OK, 74501. Legally described as : A TRACT OF LAND IN THE N1/2 S1/2 NE1/4 NW1/4 OF SECTION 19, TOWNSHIP 5 NORTH, RANGE 15 EAST OF THE INDIAN BASE AND MERIDIAN, PITTSBURG COUNTY, STATE OF OKLAHOMA, MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTHEAST CORNER OF THE NE1/4 NW1/4 OF SAID SECTION 19; RUNNING THENCE SOUTH ALONG THE EAST LINE OF SAID NE1/4 NW1/4, A DISTANCE OF 708 FEET TO A POINT ON THE SOUTHERLY RIGHT-OF-WAY LINE OF U.S. HIGHWAY #69, FOR A POINT OF BEGINNING; THENCE CONTINUING SOUTH ALONG SAID EAST LINE THE NE1/4 NW1/4, A DISTANCE OF 282 FEET; THENCE WEST AND PARALLEL WITH THE NORTH LINE OF SAID SECTION 19, A DISTANCE OF 737.2 FEET TO A POINT ON THE SOUTHERLY RIGHT-OF-WAY LINE OF U.S. HIGHWAY #69; THENCE IN A NORTHEASTERLY DIRECTION ALONG THE SOUTH RIGHT-OF-WAY LINE OF SAID HIGHWAY, A DISTANCE OF 789 FEET TO THE POINT OF THE BEGINNING.

<sup>3</sup> This figure is excluding attorney fees, court costs, and expenses incurred to preserve the Real Property which incurred after August 21, 2008, the date of the Affidavit of Paul Mesmer [Docket No. 41-2].

action. BOK is entitled to payment of its reasonable attorney fees and legal expenses under the terms of the BOK Note and BOK Mortgage.

**B. With respect to the United States:**

- 1.) Defendants James B. Smith and Bret B. Smith executed a promissory note in favor of Rural Enterprises of Oklahoma, Inc. Which was subsequently assigned to the Small Business Administration (“SBA Note”).
- 2.) The SBA Note was secured by a second priority mortgage (“SBA Mortgage”).
- 3.) Watt’s Oil Company guarantied the indebtedness of James B. Smith and Brett B. Smith under the SBA Note.
- 4.) The SBA Mortgage is a valid, priority mortgage on the Real Property.
- 5.) The SBA Mortgage secures the obligations of Defendants James B. Smith, Brett B. Smith, and Watt’s Oil Company pursuant to the SBA Mortgage and SBA Guaranty.
- 6.) Defendants James B. Smith, Brett B. Smith, and Watt’s Oil Company have defaulted under the SBA Note and SBA Guaranty secured by the SBA Mortgage by, among other things, failing to make monthly payments when due under the SBA Note and SBA Mortgage.
- 7.) There is now due the United States from Defendants James B. Smith, Brett B. Smith, and Watt’s Oil Company the sum of \$229,390.15, plus additional interest accruing after July 8, 2008, at the rate of \$29.16 per diem until the judgment is satisfied, late charges and reasonable attorney fee as provided for in the SBA Note and SBA Mortgage and other costs incurred by the United States in the prosecution of this action.

Additionally, the Court orders the Real Property to be sold with appraisal, subject to unpaid

taxes, with the proceeds applied in the following order:

- 1.) First, payment of all costs and expenses of foreclosure.
- 2.) Second, in partial satisfaction of BOK's lien, payment to BOK of \$246,676.61 (which is \$215,250 in principal, \$26,192.43 in accrued interest to February 20, 2008), plus all like utilities until the sale of the Real Property is confirmed, plus interest from February 20, 2008 at the non-default rate of 6.64% per annum, which is \$39.05 per diem, until BOK is paid in full.
- 3.) Third, Payment of the surplus, if any, into Court pending further orders and/or judgment.

**IT IS SO ORDERED** this 23<sup>rd</sup> day of January, 2009.

  
James H. Payne  
United States District Judge  
Eastern District of Oklahoma